

in use in the industry.²⁴⁸ In addition, RTC suggests that there is no reason not to allow joint ownership to extend to the complete list of "public switched network infrastructure, technology, information, and telecommunications facilities and functions" as set out in section 259(a).²⁴⁹

101. Concurring with our tentative conclusion as offered in the NPRM, RTC advises that, where a qualifying carrier makes a request to share infrastructure jointly owned by an incumbent LEC and one or more qualifying carriers, the joint owners would be treated as the providing incumbent LEC for the purposes of our infrastructure sharing regulations.²⁵⁰ Some parties claim that the Commission's accounting and separations rules, Part 32²⁵¹ and Part 36²⁵² of the Commission's rules, need not be changed -- or need not be changed immediately -- to accommodate joint ownership under section 259.²⁵³ RTC states that each carrier would simply allocate its investment, expense, and revenue according to its ownership interest as determined in the sharing agreement.²⁵⁴ MCI further asserts that it anticipates that the scope of any joint ownership projects likely to be undertaken before the Commission completes its proceeding reforming Part 32 and Part 36 of its rules will be small. Thus, MCI argues that it is not necessary for the Commission to consider the accounting and separations implications of joint ownership in this docket.²⁵⁵

c. Discussion

102. The majority of commenters stated that the Commission should permit providing LECs and qualifying carriers to develop terms and conditions for joint ownership or operation of public switched network infrastructure and services through their own negotiations. We agree with this position. Joint ownership or operation of infrastructure and services is one method by which carriers can share infrastructure pursuant to the requirements of section 259. We note that section 259(b)(2) is permissive in nature and does not require providing LECs to engage in joint ownership or operation of infrastructure or services. We believe, given that section 259 arrangements generally are only permitted between carriers that are not competing using the

²⁴⁸ RTC Comments at 10 (arguing that the only new requirement is that these agreements be filed with state commissions).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ 47 C.F.R. § 32 *et seq.*

²⁵² 47 C.F.R. § 36 *et seq.*

²⁵³ RTC Comments at 10; MCI Comments at 8; PacTel Comments at 9 (only addressing Part 32).

²⁵⁴ RTC Comments at 10; *see also* PacTel Comments at 9.

²⁵⁵ MCI Comments at 8.

shared infrastructure and, further, that providing incumbent LECs are permitted to recover all costs they incur as a result of providing the shared infrastructure, disincentives for cooperation that characterize a competitive situation are absent and, as a result, limited Commission regulation with respect to joint ownership or operation of infrastructure or services is justified at this time. Further, we affirm our tentative conclusion that all joint owners should be treated as providing incumbent LECs for purposes of our section 259 regulations. We believe that this requirement will facilitate the provision of infrastructure to other qualifying carriers by making clear that joint owners cannot avoid their section 259 sharing obligations.

103. Finally, we conclude that the term "public switched network infrastructure and services" in section 259(b)(2) includes all of the elements listed in section 259(a) (*i.e.*, public switched network infrastructure, technology, information, and telecommunications facilities and functions). As no commenter suggested a narrower reading of the term, we believe that permitting carriers to jointly own or operate such elements or information will expand the opportunities for parties to create infrastructure sharing arrangements. Further, we agree with the position of MCI that the scope of joint ownership projects likely to be undertaken prior to the Commission's completion of its proceeding reforming Part 32 and 36 of its rules is small, and thus it is not necessary for the Commission to consider at this time the accounting and separations implications of joint ownership arrangements pursuant to section 259.

3. Section 259(b)(3)

a. Background

104. Section 259(b)(3) provides that neither the Commission nor any state shall treat incumbent LECs as "common carrier[s] . . . or as offering common carrier services with respect to any infrastructure, technology, information, facilities, or functions made available to a qualifying carrier in accordance with regulations issued pursuant to this section."²⁵⁶ In the NPRM, the Commission sought comment on whether, and the extent to which, section 259(b)(3) imposes limits on the obligations of providing LECs to qualifying carriers.²⁵⁷ Notwithstanding the directive of section 259(b)(3), we also sought comment on whether the section 259(a) requirement that infrastructure sharing be made available "to *any* qualifying carrier" reflects an inherent nondiscrimination principle.²⁵⁸

b. Comments

105. Most commenters agree that section 259(b)(3) prohibits the Commission and the states from imposing any common carrier requirements with respect to any infrastructure

²⁵⁶ 47 U.S.C. § 259(b)(3).

²⁵⁷ NPRM at ¶ 22.

²⁵⁸ 47 U.S.C. § 259(a) (emphasis added).

technology, information, facilities or functions made available pursuant to section 259.²⁵⁹ For example, USTA states that "the Congressional language could not be more clear [--] providing LECs are to be treated as private carriers and need not provide the same capabilities on the same terms to all [qualifying carriers]."²⁶⁰ Several incumbent LECs argue that a providing incumbent LEC should have the option to make tariffed offerings available under section 259, although it cannot be compelled to make such an offering.²⁶¹ A number of commenters addressed the issue of whether the Commission should read an inherent non-discrimination principle into section 259 and the vast majority of these commenters contend that there is no basis for such an interpretation.²⁶² BellSouth states: "Any such inference . . . would be contrary to the express provisions of section 259(b)(3) and must be rejected."²⁶³ BellSouth and USTA comment that the language in section 259(a) that requires sharing with "any qualifying carrier" does not suggest any non-discrimination obligation, but simply indicates to whom infrastructure must be made available.²⁶⁴ Several carriers also argue that, although section 259(b)(3) requires the Commission to ensure that incumbent LECs are not treated as common carriers with respect to any infrastructure shared pursuant to section 259, it does not preclude providing incumbent LECs from electing to offer infrastructure sharing on a tariffed basis, *i.e.*, as common carriers.²⁶⁵

106. In contrast, AT&T and Frontier suggest that the Commission should impose a limited non-discrimination principle that would enable competing qualifying carriers to obtain

²⁵⁹ See, e.g., USTA Comments at 21; RTC Comments at 10-11; Minnesota Coalition Comments at 3; BellSouth Comments 13-14; Frontier Comments at 5-6.

²⁶⁰ USTA Comments at 21. See also GTE Comments at 16 ("Congress plainly knew how to impose a nondiscrimination requirement when it so intended. . . . The absence of an explicit nondiscrimination obligation in Section 259(b)(3) should be interpreted as precluding the Commission from imposing such a requirement.").

²⁶¹ See GTE Comments at 15-16; NYNEX Comments at 14; PacTel Comments at 11 (acknowledging that arrangements offered pursuant to tariff would be treated as regulated services and subject to common carrier requirements).

²⁶² See, e.g., USTA Comments at 21; NYNEX Comments at 13-14; RTC Comments at 10-11; PacTel Comments at 11; Southwestern Bell (arguing that, because section 259 does not require the sharing of communications or telecommunications services, section 201 and corresponding prohibitions against unreasonable discrimination do not apply).

²⁶³ BellSouth Comments at 13-14.

²⁶⁴ BellSouth Comments at 14; USTA Comments at 21.

²⁶⁵ See, e.g., GTE Comments at 16 n.24 (section 259(b)(7) states that tariffs, contracts, or other arrangements for infrastructure sharing must be filed with the Commission or the state); PacTel Comments at 11 (Providing incumbent LECs should have the option of offering infrastructure sharing arrangements either as common carriage or private carriage. Arrangements offered pursuant to tariff would be treated as regulated services for Part 64 purposes and subject to common carriage requirements including nondiscrimination and expansion requirements.); NYNEX Comments at 14 (providing incumbent LECs should have the option to satisfy section 259 requests with existing common carrier offerings).

section 259 offerings on comparable terms.²⁶⁶ AT&T states that "it is inherently reasonable to require that [incumbent LECs] which enter into sharing agreements do so on non-discriminatory terms to ensure that the [incumbent LECs] do not abuse their position to the detriment of similarly situated carriers."²⁶⁷ MCI argues that "[a]ll carriers, including qualifying Section 259 carriers, should be able to gain nondiscriminatory access to those facilities, services, etc., covered under Part 51 of the Commission's rules."²⁶⁸ MCI claims that the Commission need not be concerned whether different terms and conditions concerning access to facilities negotiated under section 259 are discriminatory because nondiscriminatory access to section 251 facilities will ensure that qualifying carriers have nondiscriminatory access to the providing LEC's facilities needed for them to maintain a competitive position against their potential rivals.²⁶⁹ Several parties counter that discrimination is not a significant issue because most section 259 agreements will be customized to reflect the unique needs of the qualifying carriers.²⁷⁰ BellSouth argues that the section 259(b)(4) requirement that sharing agreements be on just and reasonable terms that permit qualifying carriers to fully benefit from the economies of scale and scope of the providing incumbent LEC are "likely to drive many agreements to a substantial degree of sameness."²⁷¹ Finally, USTA states that there is nothing in section 259 to indicate that Congress was concerned about qualifying carriers competing with one another, so there is no need for the Commission to equalize the opportunities available to qualifying carriers under section 259.²⁷²

c. Discussion

107. We conclude that section 259(b)(3) encourages the establishment of infrastructure sharing agreements by permitting providing incumbent LECs to negotiate agreements that satisfy the precise needs of particular qualifying carriers without subjecting providing incumbent LECs to common carrier obligations with respect to the provisions of such agreements. As discussed below, section 259(b)(4) requires that infrastructure sharing agreements make infrastructure, technology, information, facilities or functions available to qualifying carriers on just and

²⁶⁶ AT&T Reply Comments at 6 n.13; Frontier Comments at 5 n. 13 (noting that the Commission should not expand this non-discrimination principle any further).

²⁶⁷ AT&T Reply Comments at 6, n. 13 (claims that this interpretation is supported by section 259(b)(7) which requires incumbent LECs to file tariffs or contracts showing the terms and conditions of their sharing arrangements).

²⁶⁸ MCI Comments at 8.

²⁶⁹ *Id.*

²⁷⁰ See Minnesota Coalition Comments at 8; GTE Reply Comments at 9. See also RTC Comments at 11 (imposing non-discrimination provision will create disincentive for providing incumbent LECs to make sharing agreements available).

²⁷¹ BellSouth Comments at 14. See also RTC Comments at 11; USTA Comments at 22.

²⁷² USTA Comments at 22.

reasonable terms and conditions. We believe that any agreement that treats one qualifying carrier in a substantially different manner from another competing qualifying carrier would likely raise questions concerning whether the terms and conditions of the less favorable agreements were just and reasonable. We note, moreover, that a LEC that does not qualify as a qualified carrier under section 259 may still, of course, obtain from a providing incumbent LEC any services and elements available to it pursuant to section 251. We note that sections 201 and 251 expressly require rates set pursuant to those provisions not only to be just and reasonable, but also non-discriminatory or not unreasonably discriminatory.²⁷³ Also, section 259 of the Act specifically carved out a special benefit for qualifying carriers that is unavailable to other nonqualifying competitive LECs. We note, however, that any collusive agreement between a providing LEC and a qualifying carrier, with the intent of restricting competitive entry into either the providing incumbent LEC's or the qualifying carrier's market, possibly would violate antitrust laws and subject both carriers to the appropriate legal sanctions. In addition, such agreements would likely be against the public interest and be unjust and unreasonable and, therefore, invite Title II sanctions.

108. We do not believe that the record is sufficient at this time to permit the Commission to decide whether providing incumbent LECs should be permitted to file tariffs for infrastructure sharing as common carrier services pursuant to section 259.²⁷⁴ Section 259(b)(7) specifically allows parties to file "tariffs," but the legal significance of such tariffs is difficult to determine given the section 259(b)(3) requirement that providing incumbent LECs not be treated as common carriers or as offering common carrier services with respect to section 259 infrastructure sharing. Although some parties suggested that the Commission permit carriers to file tariffs for infrastructure sharing, the record is not adequate to determine what the legal effect of such tariffs would be, *e.g.*, what obligations a providing incumbent LEC could be subject to after a tariff was filed. We direct carriers that wish to pursue this matter to do so pursuant to our declaratory ruling provisions so that we may develop an adequate record on the issues.

4. Section 259(b)(4)

a. Background

109. Section 259(b)(4) requires the Commission to adopt regulations to ensure that the providing LEC makes the "infrastructure, technology, information, facilities, or functions available to a qualifying carrier on just and reasonable terms and conditions that permit such qualifying carrier to fully benefit from the economies of scale and scope of such [providing] local exchange carrier, as determined in accordance with guidelines prescribed by the Commission in regulations

²⁷³ 47 U.S.C. §§ 201 (not unreasonably discriminatory), 251 (non-discriminatory).

²⁷⁴ See, *e.g.*, GTE Comments at 16; PacTel Comments at 11; NYNEX Comments at 14 (providing incumbent LECs should have the option to satisfy section 259 requests with existing common carrier offerings).

issued pursuant to this section.²⁷⁵ In the NPRM, the Commission sought comment on how to ensure that qualifying carriers benefit fully from the economies of scale and scope of the providing LEC. Specifically, we sought comment on whether section 259 conferred on the Commission authority to promulgate rules or guidelines to govern the price of "infrastructure, technology, information, facilities or functions" made available by providing LECs. We also sought comment on whether the Commission should establish other terms and conditions for infrastructure sharing agreements or whether the parties themselves and the state commission are better suited to establish such provisions.²⁷⁶

b. Comments

110. Most commenting parties argue that questions about pricing are not implicated by the requirements of section 259(b)(4).²⁷⁷ GTE argues that the section 252 pricing standards referenced in section 251 are irrelevant to section 259.²⁷⁸ NYNEX agrees with GTE and argues that Congress intended pricing of infrastructure furnished under section 259 to be a matter of negotiation between the parties.²⁷⁹ BellSouth argues that providing shared infrastructure at a rate below the providing LEC's costs would constitute a subsidy and is not contemplated by section 259.²⁸⁰ MCI, however, contends that the phrase "fully benefit from economies of scale and scope" does implicate questions about pricing and, further, that the phrase requires a providing LEC to make its facilities available to qualifying carriers at the providing LEC's [average] short-run incremental cost, without recovering profit or common costs.²⁸¹

²⁷⁵ 47 U.S.C. § 259(b)(4).

²⁷⁶ NPRM at ¶¶ 23-24.

²⁷⁷ BellSouth Comments at 12-13; GTE Comments at 17 and Reply Comments at 7; NYNEX Comments at 14-15 and Reply Comments at 7-8; PacTel Comments at 14 and Reply Comments at 5-6; RTC Comments at 11. Southwestern Bell Comments at 13 and Reply Comments at 12; USTA Comments at 18; Oregon PUC Comments at 3 (the Commission has authority to promulgate rules or guidelines to govern price "only with respect to interstate facilities and functions").

²⁷⁸ GTE Comments at 9 ("The fact that Congress specifically provided that such sharing arrangements were to be between non-competing carriers and did not repeat the unbundled elements and resale provisions in Section 251 shows that it intended Section 259 arrangements to be different.").

²⁷⁹ NYNEX Reply Comments at 7-8; PacTel Comments at 14-15 (national standards on pricing would be economically unreasonable because they would fail to take into account local conditions that may affect the costs of providing services).

²⁸⁰ BellSouth Comments at 13 n.29. See also US West Reply Comments at 3 ("[I]t is difficult to imagine a rule more likely to obstruct competitive entry than the one proposed by MCI.").

²⁸¹ MCI Comments at 9. MCI also argues that, to the extent the facilities in question are included in section 251, the short-run pricing standard should be the prices for unbundled network elements set out in *Local Competition First Report and Order*, adjusted for exclusion of profits and common costs. See also MCI reply comments at 6. Cf. ALTS Comments at 4 (arguing that a qualifying carrier should pay according to the section 251 pricing standards

111. Parties disagreeing with MCI's view argue that, even if pricing standards are implicated in section 259(b)(4), the incremental cost standard MCI suggests would not be appropriate. USTA argues that the "fully benefit" language means a qualifying carrier should be able to realize the cost, per subscriber, that the providing LEC enjoys because of its economies of scope and scale²⁸² and that the relevant costs are the actual costs of the providing incumbent LEC.²⁸³ NYNEX argues that it would be appropriate for the pricing of shared infrastructure to recover a pro rata share of fully allocated costs, based on actual accounting costs including a fair rate of return on investment reflecting business risk, etc.²⁸⁴ PacTel argues that the full benefits of economies of scale and scope are conferred whenever the qualifying carrier compensates the providing LEC the lowest amount that fully compensates the providing LEC for all relevant costs, which should include actual costs, a fair amount of shared costs and overheads, as well as a proper return on the providing LEC's investment -- and that this amount should be less than the stand-alone cost of the shared infrastructure if it were provided by the qualifying carrier.²⁸⁵ Southwestern Bell says that meeting the "fully benefit" mandate requires that the qualifying carrier pay a price that just compensates the providing LEC for all additional costs it incurs due to infrastructure sharing including: variable costs and any arrangement-specific fixed costs that arise from infrastructure sharing; a reasonable return to capital, including a risk premium; and the opportunity costs of engaging in infrastructure sharing, if any.²⁸⁶ Several of these parties assert that the pricing standard they would suggest, if a pricing standard were determined to be implied by the "fully benefit" language of section 259(b)(4), is a standard that would also be consistent with the section 259(b)(1) prohibition against requiring "economically unreasonable" agreements.²⁸⁷

112. Concerning terms and conditions other than price that could affect whether and how a qualifying carrier can "fully benefit" from the economies of scale and scope of the providing incumbent local exchange carrier, RTC states that "[a]vailability, timeliness,

where it uses shared infrastructure outside its universal service territory).

²⁸² USTA Comments at 19-21.

²⁸³ USTA Comments at 20.

²⁸⁴ NYNEX Comments at 14. *See also* NYNEX Reply Comments at 8. ("[I]t should not be assumed that prices negotiated under Section 259 would be less than or equal to TELRIC, or for that matter bear any necessary relation to pricing under Sections 251-252.").

²⁸⁵ PacTel Comments at 15. PacTel also argues here that limiting the providing LEC's return on investment to a specific rate of return is inappropriate for non-common carrier services and inconsistent with negotiated agreements.

²⁸⁶ Southwestern Bell Comments at 12-13.

²⁸⁷ USTA Comments at 20; PacTel Comments at 15; *and see* Southwestern Bell Comments at 13; Southwestern Bell Reply Comments at 13 ("At a price equal to short-run incremental cost, as MCI proposes, the sharing LEC would be compensated only for all costs directly attributable to that unit of production, but it would not properly compensate the sharing LEC for the shared and common costs associated with providing the infrastructure.").

functionality, suitability, and other operational aspects are [also] intended as benefits to be expected from infrastructure sharing."²⁸⁸ BellSouth argues that prices charged *customers* is the appropriate context in which to consider the "fully benefit" language and, further, that a qualifying carrier should be considered to fully benefit from the providing LEC's economies of scale or scope "if the sharing arrangement causes it to incur costs that allow it to charge its customers prices reasonably comparable to those charged by the providing LEC for comparable services."²⁸⁹

113. In sum, with the exception of MCI and, to some extent, ALTS, commenting parties from industry argue that the Commission need not issue pricing guidelines or requirements, or other specific requirements, to define "fully benefit from the economies of scale and scope of [the] incumbent local exchange carrier."²⁹⁰ These parties are of the general view that appropriate terms and conditions, including compensation of the providing LEC by the qualifying carrier, will result from negotiations among the parties to infrastructure sharing agreements.

114. Several parties argue that section 259 does not confer on the Commission authority to promulgate pricing rules. BellSouth observes: "As other provisions of the Act make clear, where Congress believed pricing standards under the 1996 Act were warranted, Congress provided for them explicitly. Section 259 contains no such provisions."²⁹¹ More generally, the Minnesota Coalition argues: "Clearly, Congress intended that requests made under section 259 *not* impose the duties of a common carrier on the incumbent LEC"²⁹²

c. Discussion

²⁸⁸ RTC Comments at 11.

²⁸⁹ BellSouth Comments at 12-13 (footnote omitted).

²⁹⁰ BellSouth Comments at 13; GTE Comments at 17-18 ("The rules should . . . presume that any voluntarily negotiated arrangements satisfy the statutory standard."); NYNEX Comments at 14 ("[T]his area is best left to the negotiation process, and the Commission's rules should simply codify the language of the Act."); PacTel Comments at 15 and Reply Comments at 6; RTC Comments at 11 ("[T]he Commission should not institute pricing rules when there is no indication that they are needed and the appropriate price will depend on the facts and circumstances of the negotiated agreement."); Southwestern Bell Comments at 13.

²⁹¹ BellSouth Comments at 12. *See also* PacTel Comments at 14 (section 259 does not give the Commission authority to establish pricing standards "expressly or by implication," and that to decide otherwise would both ignore the "contrary implication from the requirement that the Commission ensure conditions which promote cooperation between the parties" and "be ludicrous" because Congress "did not require [see section 252(a)(1)] such intrusive behavior even for competing carriers."); NYNEX Comments at 15 (citing the Senate floor debate on the Conference Report (February 1, 1996) and, specifically, Senator Hollings entering into the Congressional Record "Telecommunications Bill Resolved Issues" 23 (Infrastructure Sharing), which notes that "parties may negotiate the rates for such sharing.").

²⁹² Minnesota Coalition Comments at 3 (emphasis in original).

115. Section 259(b)(4) requires that the Commission "ensure that providing LECs make such infrastructure, technology, information, facilities, or functions available to a qualifying carrier on just and reasonable terms and conditions that permit such qualifying carrier to fully benefit from the economies of scale of [the providing LEC] as determined in accordance with guidelines prescribed by the Commission in regulations issued pursuant to this section."²⁹³ We believe that economies of scale and scope affect costs, and that costs incurred by a supplier generally are relevant to the prices charged by that supplier. To this extent, the "fully benefit" language of section 259(b)(4) appears to implicate questions concerning pricing. We conclude, however, that, although the Commission may have the authority to establish pricing guidelines pursuant to section 259, we do not need to address that issue at this time.

116. Although the Commission reserves the question of pricing authority, we conclude that it is not necessary at this time for the Commission to adopt pricing regulations because we believe that the negotiation process, along with the dispute resolution, arbitration, and complaint processes will ensure that qualifying carriers fully benefit from the economies of scale and scope of providing incumbent LECs. We conclude that, because section 259 requires that a qualifying carrier not use infrastructure obtained pursuant to a section 259 agreement to compete with the providing incumbent LEC, and as stated above, a providing incumbent LEC may recover all the costs it incurs as a result of providing shared infrastructure pursuant to a section 259 agreement, parties will be able to negotiate agreements beneficial to both, in accordance with the goals of section 259.²⁹⁴ In these circumstances, an incumbent LEC that receives from a qualifying carrier a request to share infrastructure under section 259 does not face the same incentives to charge excessive prices or to set other unreasonable conditions for the use of its infrastructure that arise in the competitive situations in which section 251 applies. Moreover, in the specific circumstances in which section 259 applies, we believe that the unequal bargaining power between qualifying carriers, including new entrants, and providing incumbent LECs is less relevant than it is in the more general competitive situation since the incumbent LEC has less incentive to exploit any inequality for the sake of competitive advantage. We believe that it is sufficient at this time to codify in our rules the requirements of section 259(b)(4) that infrastructure be made available on just and reasonable terms that permit a qualifying carrier to fully benefit from the economies of scale and scope of the providing incumbent LEC. If, however, parties are unable to reach satisfactory agreements, they may seek assistance through either the dispute resolution, arbitration, or complaint processes before the Commission. We reserve the right to revisit this issue if the need becomes apparent.

117. We also agree with RTC that terms and conditions of infrastructure sharing agreements relating to availability, timeliness, functionality, suitability, and other operational aspects are also relevant to whether or not the qualifying carrier fully benefits from the economies of scale and scope of the providing LEC. Consistent with our conclusion concerning

²⁹³ 47 U.S.C. § 259(b)(4).

²⁹⁴ See also Discussion at Section III. A., *supra*.

pricing, we believe that the negotiation process will ensure that qualifying carriers obtain "just and reasonable" terms and conditions that permit such carriers to fully benefit from the economies of scale and scope of the providing incumbent LEC.

5. Section 259(b)(5)

a. Background

118. Section 259(b)(5) requires the Commission to establish conditions that promote cooperation between incumbent LECs to which this sections applies and qualifying carriers.²⁹⁵ In the NPRM, the Commission sought comment on whether a good faith negotiation standard is required to promote cooperation between providing LECs and qualifying carriers. We tentatively concluded that, because agreements pursuant to section 259 must be between non-competing carriers, detailed national rules may not be necessary to promote cooperation. We further proposed not to create any new procedures to resolve disputes that may arise involving section 259, but to rely instead on informal consultations between the parties and the Commission, and, if necessary, the existing declaratory ruling procedures and the complaint process, including settlement negotiations and alternative dispute resolution.²⁹⁶

b. Comments

119. Many parties, including RTC and USTA, support the Commission's tentative conclusion that detailed national rules are not necessary to promote cooperation between providing incumbent LECs and qualifying carriers.²⁹⁷ Stressing a need for flexibility, the Minnesota Coalition indicates that, "[w]hile definitive rules might minimize disputes, they would also minimize opportunities for parties to craft arrangements that are appropriate for their specific circumstances."²⁹⁸ Other parties suggest that non-competing carriers have historically been able to achieve useful interconnection agreements without national rules.²⁹⁹ A number of these commenters would have the Commission issue broad guidelines and simply restate the statutory language of section 259 in the Commission's rules, to the greatest extent possible.³⁰⁰

²⁹⁵ 47 U.S.C. § 259(b)(5).

²⁹⁶ NPRM at ¶ 25.

²⁹⁷ RTC Comments at 11 (urging the Commission not to adopt detailed rules "in the absence of a demonstrated need"); USTA Comments at 3. *See also* Castleberry Telephone Company *et al.* Comments at 4; NYNEX Comments at 3-4; US West Comments at 3.

²⁹⁸ Minnesota Coalition Comments at 9. *See also* RTC Comments at 11; GTE Comments at 2, 18.

²⁹⁹ *See, e.g.,* Castleberry Telephone Company *et al.* Comments at 3-4; Southwestern Bell Reply Comments at 1-2.

³⁰⁰ *See, e.g.,* RTC Comments at 11; US West Comments at 8.

Alternatively, there are several parties that ask the Commission to adopt detailed rules regarding one or more of the issues raised in the NPRM.³⁰¹ For example, MCI suggests that the Commission adopt the national rules making unbundled elements available pursuant to Part 51 of the Commission's rules as a "lower-bound standard" for qualifying carriers to obtain access to infrastructure under section 259.³⁰²

120. Both MCI and the Minnesota Coalition conclude that a "good faith negotiation standard" is not necessary to promote cooperation between qualifying carriers and providing incumbent LECs.³⁰³ A number of parties comment that the Commission's existing declaratory ruling and complaint processes are adequate to resolve any disputes.³⁰⁴ Alternatively, the Minnesota Coalition asserts that state commissions should play the primary role in resolving disputes under section 259.³⁰⁵

c. Discussion

121. We conclude that it is unnecessary at the present time for the Commission to establish detailed national rules to promote cooperation in the area of infrastructure sharing. We believe that, because there is a requirement that infrastructure sharing arrangements not be used to compete with the providing incumbent LECs,³⁰⁶ and because providing carriers are permitted to recover the costs associated with infrastructure sharing,³⁰⁷ sufficient incentives exist to encourage lawful cooperation between carriers. As previously discussed in Section III. B. 3., *supra*, we agree with NYNEX that informal consultation with the Commission, along with the Commission's complaint process, will likely be adequate to ensure that infrastructure sharing

³⁰¹ See MCI Comments at 9-10; NCTA Reply Comments at 3 ("Unless the rules adopted under Section 259 are conformed to the requirements of Section 251, the [incumbent LECs] will attempt to use infrastructure sharing agreements in ways that would thwart competition in both providing carrier and qualifying carrier markets."); Octel Reply Comments at 4 (urging the Commission to adopt rules to protect proprietary information).

³⁰² MCI Comments at 9-10. *But cf.* PacTel Reply Comments at 5-6 (encouraging Commission to reject calls for national price rules for section 259).

³⁰³ MCI Comments at 10; Minnesota Coalition Comments at 9-10 (explaining that a "good faith" standard is not needed where providing incumbent LECs will not be "required to provide facilities at a loss").

³⁰⁴ See, e.g., RTC Comments at 11; PacTel Comments at 9 (the Commission or states can be involved if parties cannot reach agreement); USTA Comments at 3-4; NYNEX Comments at 15 (noting availability, *inter alia*, of informal consulting process).

³⁰⁵ Minnesota Coalition Comments at 12. See also Castleberry Telephone Company *et al.* Comments at 4 ("Disputes involving Section 259 agreements can be taken to the State Commission's for resolution on a case by case basis as needed.").

³⁰⁶ See Discussion at Section III. C. 6., *infra*.

³⁰⁷ See Discussion at Section III. C. 1., *supra*.

agreements further the purposes stated in section 259(a). Indeed, if we have any concerns regarding cooperation between providing incumbent LECs and qualifying carriers it is that these parties cooperate so as to achieve lawful objectives, for example, infrastructure sharing that reflects the limitations on the scope of such agreements imposed by section 259,³⁰⁸ and that does not unlawfully constrain the interconnection rights of non-qualifying competitive carriers.³⁰⁹ We are confident, however, that the availability of the Commission's declaratory ruling and complaint processes, both to parties and to competitors, will ensure that any problems in this regard will be brought to our attention expeditiously.

122. We also conclude that the adoption of a good faith negotiation standard would promote cooperation between providing incumbent LECs and qualifying carriers.³¹⁰ We do not attempt to determine here every action that might be inconsistent with the duty to negotiate in good faith, but we believe that certain minimum standards can offer the parties some guidance. We decide that, at a minimum, the duty to negotiate in good faith means that parties are prevented from intentionally misleading or coercing other parties into reaching an agreement that they would not otherwise have made. In addition, we conclude that intentionally obstructing negotiations also would constitute a failure to negotiate in good faith. To the extent that some guidance may be appropriate, we believe that the examples concerning the duty to negotiate in good faith offered in the Commission's local competition rules illustrate the types of practices that may evidence a failure to meet a good faith standard.³¹¹

6. Section 259(b)(6)

a. Background

123. Section 259(b)(6) states that the Commission's regulations must not require infrastructure sharing "for services or access which are to be provided or offered to consumers by the qualifying carrier" in the providing LEC's telephone exchange area.³¹² In the NPRM, the Commission tentatively concluded that this provision encompassed any telecommunications or information service offered by the providing LEC directly to consumers, or any access service offered to other providers which in turn offered services to consumers. We also tentatively concluded that an incumbent LEC should not be required to share services or access, pursuant to section 259(b)(6), that would be used by the qualifying carrier to compete in the providing

³⁰⁸ See Discussion at Section III. B. 1., *supra*, at ¶ 50.

³⁰⁹ See Discussion at Section III. B. 1., *supra*, at ¶ 59.

³¹⁰ See also Discussion at Section III. B. 4., *supra*.

³¹¹ See *Local Competition First Report and Order* at ¶¶ 150-156.

³¹² 47 U.S.C. § 259(b)(6).

LEC's telephone exchange service area.³¹³ Because section 259(b)(6) does not mandate infrastructure sharing between competing carriers, we tentatively concluded that a providing LEC may terminate an agreement in the event it discovers that the qualifying carrier is offering or providing service or access in the providing LEC's service area. We also tentatively concluded, however, that the providing LEC has the burden of proving that the qualifying carrier is providing or offering services or access obtained pursuant to section 259 to consumers in the providing LEC's telephone exchange area.³¹⁴

124. We sought comment on how disputes concerning violations of the section 259(b)(6) competition provision should be adjudicated by the Commission. We sought comment on whether sixty days was reasonable notice for a providing LEC to provide a qualifying carrier if a providing incumbent LEC seeks to terminate an infrastructure sharing arrangement for cause pursuant to section 259(b)(6). Finally, we sought comment on whether the term "services or access" in section 259(b)(6) applies to all "public switched network infrastructure technology, information, and telecommunications facilities and functions" available pursuant to section 259(a), or whether section 259(b)(6) limits an incumbent LEC's right to deny agreements to only a limited set of provisions, namely, "services or access."³¹⁵

b. Comments

125. Many commenters argue that the Commission must make clear that qualifying carriers should not be able to use shared infrastructure to compete with the providing LEC.³¹⁶ GTE claims that the Commission should ensure that a qualifying carrier does not try to evade the section 259(b)(6) restriction by permitting or enabling another carrier to resell facilities obtained through infrastructure sharing in the providing LEC's service area.³¹⁷ RTC agrees that a providing LEC need not share infrastructure where a qualifying LEC is offering service in the providing LEC's exchange area, but claims that a providing LEC must not be able to escape its sharing obligations by expanding into a qualifying carrier's region.³¹⁸ RTC suggests that the burden be

³¹³ NPRM at ¶ 26.

³¹⁴ NPRM at ¶ 27.

³¹⁵ *Id.*

³¹⁶ See, e.g., GTE Comments at 19; NYNEX Comments at 16; PacTel Comments at 10-11; Castleberry Telephone Company *et al.* Comments at 6 (if a qualifying carrier chooses to compete with the incumbent LEC, section 259 does not apply, but rather section 251 must be used).

³¹⁷ GTE Comments at 19.

³¹⁸ RTC Comments at 13; RTC Reply Comments at 8-9 (permitting providing LECs to terminate section 259 agreements when the providing LEC initiates the competition collides with the statutory language because the infrastructure sharing requirement applies to "incumbent LECs" and the providing LEC is not an incumbent in the qualifying LECs service area). But see MCI Comments at 10 (the providing LEC could then abrogate the terms of

placed on the providing LEC to prove a violation of section 259(b)(6) via the Commission's complaint process.³¹⁹

126. ALTS, on the other hand, argues that there is no requirement that a qualifying carrier and a providing LEC not compete in order to implement section 259. ALTS claims that section 259(b)(6) requires that carriers not be required to enter infrastructure agreements for any services or access which qualifying carriers intend to offer to end users in the providing LECs territory. ALTS suggests that this section in no way prohibits competition but rather simply requires a qualifying carrier to either build its own infrastructure for that purpose, or else pay for the infrastructure under the section 251 pricing standard.³²⁰ GTE states that section 259(b)(6) must be read as encompassing any public switched network infrastructure, technology, information, and telecommunications facilities and functions that the qualifying carrier might obtain.³²¹ NYNEX claims that "services or access" refers not to any portion of the infrastructure made available, but instead, to the qualifying carrier's offerings which result as a benefit of the sharing.³²²

127. Several commenters urge the Commission to permit parties to decide, during the negotiation process, the notice period that must be given prior to termination of a section 259 agreement because of a violation of the non-competition requirement in section 259(b)(6).³²³ RTC claims that a sixty-day notice should be provided to qualifying carriers and to the Commission. RTC argues that a qualifying carrier must be given an opportunity to discontinue any conduct inconsistent with section 259, explain why its conduct is not barred by the restriction on competitive use of shared infrastructure, or make alternative arrangements to supply the end

the section 259 agreement simply by choosing to compete against the qualifying carrier). MCI also claims that an absolute prohibition on using a providing LECs facilities obtained under a section 259 agreement to compete against the providing LEC would permanently lock the requesting carrier into a noncompetitive relationship with the providing LEC. MCI Comments at 10. NYNEX claims that this possibility can be addressed in the negotiation process. NYNEX Reply Comments at 5.

³¹⁹ RTC Comments at 12.

³²⁰ ALTS Comments at 4; USTA Reply Comments at 10-11 (nothing in section 259 precludes competition between parties to a section 259 agreement but rather merely requires qualifying carriers who wish to compete with providing LECs to do so using their own infrastructure, infrastructure acquired from third parties, or infrastructure obtained via a section 251-252 agreement).

³²¹ GTE Comments at 19.

³²² NYNEX Comments at 16; *see also* Ameritech Comments at 9.

³²³ *See, e.g.*, GTE Comments at 20; USTA Comments at 23-24 (contracts will call for termination but a 60 day notification requirement is acceptable); Ameritech Comments at 9 (if the qualifying LEC is able to obtain a corresponding capability under section 251, the end users are unlikely to need notice at all); Minnesota Coalition Comments at 10; PacTel Comments at 13 (sixty day notification requirement is adequate).

users.³²⁴ NCTA contends that the features and functions obtained by the qualifying carrier under section 259 must be made available to competitive LECs competing in that qualifying carrier's market pursuant to section 251. NCTA claims that, otherwise, infrastructure sharing agreements will become a vehicle for distorting competition in small and rural markets.³²⁵

c. Discussion

128. Section 259(b)(6) provides that an incumbent LEC shall not be required to "engage in any infrastructure sharing agreement for any services or access which are provided or offered to consumers by the qualifying carrier in such [LEC's] telephone exchange area."³²⁶ As an initial matter, we agree with ALTS that section 259(b)(6) does not serve to prohibit competition between the providing incumbent LEC and qualifying carriers. Rather, section 259(b)(6) merely establishes a limitation on how qualifying carriers may use "public switched network infrastructure, technology, information, and telecommunications facilities and functions" they obtain pursuant to section 259(a). Where a qualifying carrier seeks to obtain "public switched network infrastructure, technology, information, and telecommunications facilities and functions" from an incumbent LEC, it may do so pursuant to section 259, but only if it does not use this infrastructure, technology, information, and telecommunications facilities and functions to compete with the incumbent LEC in the incumbent LEC's telephone exchange area. If a qualifying carrier does propose to use requested infrastructure, technology, information, and telecommunications facilities and functions to compete with an incumbent LEC in the incumbent LEC's telephone exchange area, the qualifying carrier must rely on section 251 to obtain capabilities that are available pursuant to section 251. Moreover, a qualifying carrier may rely on section 251 even if it does not intend to compete with the incumbent LEC because, as a fundamental matter, section 251(c) requires incumbent LECs to provide interconnection and access to unbundled network elements to *all* requesting telecommunications carriers, and such interconnection and access will predictably include at least some of the functionalities that are otherwise made available pursuant to section 259.

129. In sum, we conclude that, for any services and facilities that are available pursuant to section 251, qualifying carriers may request such services and facilities from incumbent LECs pursuant to either section 251 or 259. Carriers, however, must make such requests pursuant to section 251 to the extent that the requested facilities will be used to provide service or access in the providing incumbent LEC's telephone exchange area. We conclude that, with respect to any facilities and information that may be beyond the scope of section 251, carriers are limited to the

³²⁴ RTC Comments at 12. RTC suggests that the providing LEC should also not terminate until the qualifying carrier has an opportunity to restructure the arrangement pursuant to section 251. RTC claims that the providing LEC should not be permitted to discontinue the service if the shared infrastructure is not available pursuant to section 251 and the providing LEC cannot provide the required infrastructure to the affected end users. RTC comments at 13.

³²⁵ NCTA Reply Comments at 5.

³²⁶ 47 U.S.C. § 259(b)(6).

provisions of section 259, including its limitation on using facilities and information to serve customers in the providing incumbent LEC's telephone exchange area.

130. Because we conclude that section 259(b)(6) mandates that providing LECs are not required to share services or access that would be used to compete against the providing LEC, we also find that section 259 agreements may be terminated by any party if the qualifying carrier begins to use the section 259 facilities to compete with the providing incumbent LEC in the incumbent LEC's telephone exchange area. This could happen either as a result of the qualifying carrier's decision to enter the incumbent LEC's telephone exchange area, or, in certain cases, where the providing incumbent LEC expands its operations into the qualifying carrier's telephone exchange area. We agree with Ameritech that the right to deny or terminate sharing arrangements extends to the full breadth of section 259 (*i.e.*, public switched network infrastructure, technology, information, and telecommunications facilities and functions),³²⁷ but only to the extent that these facilities and functions would actually be used to provide service within the providing LEC's telephone exchange area. We conclude, however, that if a providing incumbent LEC seeks to terminate a sharing agreement as violating the restrictions in section 259(b)(6), qualifying carriers should be given adequate notice to protect their customers against sudden changes in service. We agree with USTA that providing carriers should give qualifying carriers sixty days notice prior to termination. We adopt these requirements to protect qualifying carriers and their customers from sudden service disruptions and, nevertheless, to allow providing carriers to terminate in a timely fashion agreements that are contrary to section 259(b)(6). Finally, we note our expectation that prudent parties will address such contingencies, *i.e.*, changed circumstances that might implicate section 259(b)(6), as terms of their infrastructure sharing agreements.

131. We also conclude that a qualifying carrier may not make available any information, infrastructure, or facilities it obtains from a providing incumbent LEC to any party that the qualifying carrier knows intends to use such information, infrastructure, or facilities to compete with the providing LEC in the providing LEC's telephone exchange area. We believe that this would result in an easy evisceration of the section 259(b)(6) requirement. If other carriers require the use of such information or facilities, they may pursue their own section 259 arrangement with the providing LEC or, if the necessary facilities are available pursuant to section 251, they may request a section 251 arrangement. We believe that this requirement will encourage the use of infrastructure sharing arrangements by ensuring that providing LECs will not be forced to provide such arrangements to qualifying carriers that will in turn pass them on to carriers that compete with the providing carrier.

7. Section 259(b)(7)

a. Background

³²⁷ Ameritech Comments at 9.

132. Section 259(b)(7) requires that incumbent LECs file with the Commission or state for public inspection any tariffs, contracts, or other arrangements showing the conditions under which the incumbent LEC is making available public switched network infrastructure and functions.³²⁸ In the NPRM, the Commission tentatively concluded that the filing requirement in section 259(b)(7) refers only to agreements reached pursuant to section 259, because qualifying carriers obtaining interconnection or access to unbundled elements pursuant to section 251 or pursuant to agreements entered into prior to the enactment of the 1996 Act are under an obligation to file agreements with the state commission.³²⁹ We further tentatively concluded that incumbent LECs should be required to file all tariffs, contracts, or other arrangements reached pursuant to section 259 with the appropriate state commission. We also sought comment on whether an incumbent LEC must file agreements showing the rates, terms, and conditions under which such carrier is making available technology, information, and telecommunications facilities and functions listed in section 259(a) or whether section 259(b)(7) is limited only to public switched network infrastructure and functions.

b. Comments

133. Both GTE and MCI supported the Commission's tentative conclusion that section 259(b)(7) applies only to sharing agreements reached pursuant to section 259,³³⁰ while RTC and the Minnesota Coalition opposed this proposition.³³¹ The Minnesota Coalition suggests that an agreement between an incumbent LEC and a rural carrier or between two rural carriers, which could be invalid under the standards of section 251, could be fully justified under section 259.³³² RTC argues that neither the language of section 252 and 259 nor the legislative history support the Commission's conclusions in the *Local Competition First Report and Order*.³³³ A number of other parties commented on the tentative conclusion that a filing required by section 259(b)(7) should be made with the appropriate state commission.³³⁴ Some argue that the language of section 259(b)(7) is evidence that Congress did not intend to alter the dual jurisdiction scheme

³²⁸ 47 U.S.C. § 259(b)(7).

³²⁹ NPRM at ¶ 28.

³³⁰ GTE Comments at 20; MCI Comments at 11-12.

³³¹ Minnesota Coalition Comments at 6; RTC Comments at 13-15. See also USTA Reply Comments at 4 ("[existing] agreements which meet the obligations and provisions of Section 259 should not be subjected to the provisions of Sections 251 and 252").

³³² Minnesota Coalition Comments at 6.

³³³ RTC Comments at 13-15 (suggesting that pre-existing agreements first be examined under section 259 rather than section 252).

³³⁴ See, e.g., GTE Comments at 20 (all section 259 agreements should be filed with state commissions); Minnesota Coalition Comments at 12 (all section 259 agreements are required under the statute to be filed with state commissions); RTC Comments at 15 (filing should be made with Commission or state depending on jurisdiction).

in which the Commission exercises jurisdiction over interstate matters and the states exercise jurisdiction over intrastate matters.³³⁵ Parties agreed that section 259(b)(7) obligates LECs to file all agreements showing the rates, terms, and conditions under which such carrier is making available any public switched network infrastructure, technology, information, and telecommunications facilities or functions pursuant to section 259.³³⁶ MCI argues that section 259(b)(7) filings should "disclose rates, terms, and conditions under which information, data bases, and facilities are made available in order to evaluate specifically whether section 259 agreements are indeed more favorable to the requesting carrier" than section 251 agreements.³³⁷

c. Discussion

134. We affirm our tentative conclusion in the NPRM that section 259(b)(7), which requires incumbent LECs to file with the Commission or the state all agreements showing the conditions under which the incumbent LEC is making available "public switched network infrastructure and functions," refers only to agreements reached pursuant to section 259. We note that qualifying carriers obtaining interconnection or access to unbundled elements pursuant to section 251, or through agreements entered into prior to the enactment of the 1996 Act, are under a separate obligation to file such agreements with the appropriate state commission.³³⁸ We interpret the term "public switched network infrastructure and functions under this section" should be read to include all requirements listed in section 259(a) (*i.e.*, public switched network infrastructure, technology, information, and telecommunications facilities and functions).³³⁹

135. We also conclude that agreements reached pursuant to section 259 must be filed with the appropriate state commission, or the Commission if the state commission is unwilling to accept the filing, and that the agreement must be available for public inspection. These filed agreements must include the rates, terms, and conditions under which the providing carrier is making infrastructure available. As discussed above, we believe that this filing requirement will help ensure that all qualifying carriers obtain infrastructure at just and reasonable terms and conditions that are consistent with the public interest. Moreover, public filing promotes general scrutiny of section 259 agreements, including scrutiny by non-qualifying competitive carriers. As noted above, we are relying on such competitive carriers to bring to our attention any

³³⁵ See, e.g., Oregon PUC Comments at 2; PacTel Comments at 13.

³³⁶ See GTE Comments at 20-21 (seeing no apparent reason to draw a different conclusion); PacTel Comments at 13; RTC Comments at 15.

³³⁷ MCI Comments at 12. *But cf.* GTE Reply Comments at 11 (suggesting there is no basis nor need for an evaluation process pursuant to section 259(b)(7)).

³³⁸ 47 U.S.C. § 252(a). See also *Local Competition First Report and Order* at ¶¶ 165-171.

³³⁹ GTE Comments at 20-21.

unlawful anticompetitive effects resulting from negotiated section 259 agreements pursuant to the Commission's declaratory ruling and complaint procedures.³⁴⁰

D. Requirements of Section 259(c)

1. Background

136. Section 259(c) states that "a local exchange carrier to which this section applies that has entered into an infrastructure sharing agreement under this section shall provide to each party to such an agreement timely information on the planned deployment of telecommunications services and equipment, including any software or upgrades of software integral to the use or operation of such telecommunications equipment."³⁴¹ In the NPRM, we tentatively concluded that section 259(c) obligations should apply only to the providing incumbent LECs.³⁴² We further noted that section 259(c) applies to providing incumbent LECs that have entered into an "infrastructure sharing agreement" and we tentatively concluded that the phrase "infrastructure sharing agreement" as used in section 259(c) should be construed to include agreements not only for public switched network infrastructure, but also for "technology, information, and telecommunications facilities and functions," *i.e.*, all section 259 agreements.³⁴³

137. We noted in the NPRM that sections 259(c) and 251(c)(5) seem to serve similar purposes.³⁴⁴ Section 251(c)(5) requires incumbent LECs to "provide reasonable public notice of changes" that may affect the use of the incumbent LECs' facilities or networks.³⁴⁵ The Commission has interpreted section 251(c) to require notice of such changes that might affect the ability of parties which have obtained interconnection pursuant to section 251 to provide service.³⁴⁶ In the NPRM, we tentatively concluded that Congress intended section 259(c) to provide similar notice to qualifying carriers of changes in the incumbent LECs' network that might affect qualifying carriers' ability to fully benefit from section 259 agreements.³⁴⁷ In addition, we asked parties to address overlap between section 259(c) and other existing network

³⁴⁰ See Discussion at Section III. B. 3., *supra*, at ¶ 81 and Discussion at Section III. C. 5., *supra*, at ¶ 120.

³⁴¹ 47 U.S.C. § 259(c).

³⁴² NPRM at ¶ 31.

³⁴³ *Id.*

³⁴⁴ NPRM at ¶ 29.

³⁴⁵ 47 U.S.C. § 251(c)(5); *see also Local Competition Second Report and Order* at ¶ 171.

³⁴⁶ *See Id.*

³⁴⁷ NPRM at ¶ 29.

disclosure provisions, including sections 273(c)(1) and 273(c)(4), and the Commission's rules at 47 C.F.R. § 64.702(d)(2) and 47 C.F.R. § 68.110(b).³⁴⁸

138. In the NPRM, we sought comment on whether the Commission should require providing incumbent LECs to furnish any particular information as a minimum threshold.³⁴⁹ Specifically, we asked parties to consider whether the Commission should require providing incumbent LECs to disclose: 1) the date changes are to occur; 2) the location at which changes will occur; 3) the type of changes; 4) the reasonably foreseeable impact of those changes, including pricing implications; and 5) a contact person to provide supplemental information. We also sought detailed comment on a variety of other issues, such as what constituted a planned deployment such that the section 259(c) obligations would be triggered, and when any required information disclosure should take place.³⁵⁰ We also asked parties to comment on the need for enforcement mechanisms to ensure compliance with section 259(c) and on the need for safeguards to ensure that competitively-sensitive, proprietary, or trade secret information of the providing incumbent LEC is not compromised.³⁵¹

2. Comments

139. Both MCI and RTC agree that the phrase "infrastructure sharing agreement," as used in section 259(c), is a generic term that covers all sharing under section 259.³⁵² RTC comments that section 259(c)'s obligations fall solely on providing incumbent LEC, and no party suggests that there should be any alternative interpretation, *e.g.*, reciprocal requirements placed on qualifying carriers. RTC, however, concludes that section 259(c) obligates not only providing incumbent LECs that have entered into section 259 agreements, but also "potential" providing incumbent LECs. RTC argues that potential providing incumbent LECs should be required to adhere to the requirements of section 259(c) so that qualifying carriers can make decisions about what sharing to request.³⁵³

140. A number of commenters support the tentative conclusion in the NPRM that section 259(c) should provide notice to qualifying carriers of changes in the incumbent LECs' network that might affect qualifying carriers' ability to fully benefit from section 259

³⁴⁸ NPRM at ¶ 30.

³⁴⁹ NPRM at ¶ 34.

³⁵⁰ NPRM at ¶¶ 32, 35, 33.

³⁵¹ NPRM at ¶ 36.

³⁵² See MCI Comments at 13; RTC Comments at 16.

³⁵³ RTC Comments at 16.

agreements.³⁵⁴ Assessing the disclosure requirements under sections 251(c)(5) and 259(c), NCTA notes that, "[w]hile Section 259(c) may require slightly different requirements with respect to the *process* of providing notice thereunder, the *contents* of the disclosures should be the same."³⁵⁵ Indeed, several parties comment that the information disclosed pursuant to section 259(c) would overlap with the information currently disclosed under section 251(c)(5).³⁵⁶ For example, GTE states that the disclosure rules in section 251(c)(5) are sufficient to ensure that qualifying carriers have access to the information needed to make use of shared facilities.³⁵⁷

141. The vast majority of the commenters discussing section 259(c) argue that the Commission should not issue rules to implement this section.³⁵⁸ Several parties comment that section 259(c) does not contain a specific Congressional directive that the Commission issue rules, as opposed to subsections (a), (b), and (d).³⁵⁹ Indeed, GTE questions whether the Commission has authority to adopt rules implement section 259(c) and comments that, "[w]hen Congress expected implementing regulations, it stated so expressly."³⁶⁰

142. Other parties maintain that no specific rules will be needed to implement section 259(c) because the parties will be able to negotiate mutually acceptable terms for information disclosure.³⁶¹ USTA states that "parties will negotiate terms concerning the content and frequency of 'timely information' required under this section."³⁶² Some parties urge the Commission not to adopt specific rules to implement this information disclosure section because it would duplicate

³⁵⁴ PacTel Comments at 17; MCI Comments at 12; RTC Comments at 15; NCTA Comments at 8.

³⁵⁵ NCTA Comments at 8 (footnote omitted).

³⁵⁶ *Id.*; BellSouth Comments at 15; GTE Comments at 21-22. *But cf.* NYNEX Comments at 16-17 (stating that "[section 259(c)] requirement is separate and distinct from disclosure requirements under Section 251," without further explanation for the purpose of section 259(c)).

³⁵⁷ GTE Comments at 21-22; GTE Reply Comments at 12. *See also* PacTel Comments at 17-18 (also noting the availability of other disclosure requirements).

³⁵⁸ *See, e.g.,* Ameritech Comments at 10; BellSouth Comments at 15; GTE Comments at 21; Southwestern Bell Comments at 14; USTA Comments at 25.

³⁵⁹ GTE Comments at 21; NYNEX Reply Comments at 11; Southwestern Bell Comments at 14; USTA Comments at 25.

³⁶⁰ GTE Comments at 21.

³⁶¹ *See, e.g.,* Ameritech Comments at 10 (suggesting that parties will negotiate detailed terms of notice depending on the particular infrastructure shared); Southwestern Bell Comments at 14 ("Commission's concerns over the details of providing information are unwarranted"). *See also* BellSouth Comments at 15.

³⁶² USTA Comments at 25.

the existing network disclosure provisions which are already available to qualifying carriers.³⁶³ PacTel argues that additional disclosure rules would be unnecessary, unduly burdensome, and confusing.³⁶⁴

143. In contrast, RTC encourages the Commission not to reduce sections 251, 259, 273 and other existing disclosure requirements into a single, uniform network disclosure requirement.³⁶⁵ RTC argues that, because section 259 contemplates relationships between non-competing carriers, its information disclosure rules will need to serve a different purpose.³⁶⁶ RTC argues that section 259(c) should go beyond mere notice of changes and should give qualifying carriers an opportunity to take part in the providing incumbent LEC's decision-making process.³⁶⁷ In reply, several larger LECs respond that section 259 does not require joint planning, although parties should be allowed to negotiate such arrangements by mutual consent.³⁶⁸ PacTel suggests that, under RTC's proposal, the providing incumbent LEC "could lose control of its network planning which would be harmful to network efficiency for all customers."³⁶⁹

144. MCI proposes that the Commission adopt the rules implementing section 251(c)(5) as the "benchmark upon which Section 259 negotiations can build."³⁷⁰ MCI recommends that the Commission issue rules requiring providing incumbent LECs to provide public notice of changes affecting requesting carriers' performance or ability to provide service or affecting interoperability. MCI would further require providing incumbent LECs to disclose: 1) the date changes are to occur; 2) the location at which changes will occur; 3) the type of changes; 4) the reasonably foreseeable impact of those changes; and 5) a contact person to provide supplemental information.³⁷¹ In response, NYNEX rejects MCI's proposal as beyond the scope of section

³⁶³ See, e.g., GTE Reply Comments at 12; PacTel Comments at 17; BellSouth Comments at 15 ("Qualifying carriers . . . will already have access to information . . . under existing disclosure requirements and vehicles.").

³⁶⁴ PacTel Comments at 18.

³⁶⁵ RTC Comments at 16.

³⁶⁶ *Id.* (section 259(c) "extends to how the providing [incumbent LEC] uses and plans to use its own facilities and its own services").

³⁶⁷ *Id.* at 18 (contemplating a "coordinated deployment schedule").

³⁶⁸ See PacTel Reply Comments at 9; GTE Reply Comments at 12 (RTC's proposal "demonstrates a misunderstanding of infrastructure sharing."); Southwestern Bell Reply Comments at 14.

³⁶⁹ PacTel Reply Comments at 9.

³⁷⁰ MCI Comments at 12. See *Local Competition Second Report and Order* at ¶ 165, *et seq.*; 47 C.F.R. §§ 51.325, 51.327, 51.329, 51.331, 51.333, 51.335.

³⁷¹ *Id.* at 13-14 (also recommending the Commission adopt section 251(c)(5) requirements on make/buy point, timing of implementation of changes, and proprietary information).

259(c) and unnecessary.³⁷² A number of parties, including RTC, state that section 259(c) only requires disclosure to parties to a sharing agreement.³⁷³

145. NCTA urges the Commission to adopt rules that restrict the contents of section 259 notice so that providing incumbent LECs do not share any more information under Section 259(c) than is made public pursuant to section 251(c)(5).³⁷⁴ NCTA states that such a rule would prevent neighboring LECs from obtaining an advantage over [competitive LECs] by giving both types of carrier the same access to information regarding planned changes to an incumbent LEC's network.³⁷⁵ USTA suggests that competitively sensitive, proprietary, or trade secret information is not required to be shared.³⁷⁶ Nonetheless, according to USTA, the Commission should not preclude the use of non-disclosure agreements.³⁷⁷

3. Discussion

146. We codify the requirements of section 259(c) in our rules, but we decline to adopt detailed standards to implement section 259(c) at this time because we believe that parties will be able to arrive at mutually acceptable terms for information disclosure through negotiation. While we are concerned that failure to convey timely information as required by section 259(c) would adversely impact qualifying carriers, we nonetheless are persuaded by the commenters' arguments that providing incumbent LECs and qualifying carriers have few, if any, incentives to withhold information on planned deployments of new services and equipment. We believe that individual circumstances of sharing agreements under section 259 will be dependent on the nature of the public switched network infrastructure, technology, information, and telecommunications facilities and functions to be shared and that parties to such agreements will be in a better position to determine information disclosure needs in each particular situation. Given our general desire to allow section 259 arrangements to develop as "the product of negotiation between the parties," we concur with Southwestern Bell that the "parameters of providing information on planned deployments would seem to fall squarely within the negotiations of an infrastructure

³⁷² NYNEX Reply Comments at 10-11.

³⁷³ See, e.g., Ameritech Comments at 10; RTC Comments at 18.

³⁷⁴ NCTA Comments at 8. *But cf.* PacTel Reply Comments at 9.

³⁷⁵ NCTA Comments at 8.

³⁷⁶ USTA Comments at 25.

³⁷⁷ *Id.* (arguing that non-disclosure agreements are consistent with the purpose of the statute because they enable the providing incumbent LECs to make information available to assist the qualifying carriers in fulfilling their universal service obligations without harming the providing incumbent LEC). See also RTC Comments at 19 (The Commission should *require* non-disclosure agreements where competitively sensitive, proprietary, or trade secret information must be furnished to qualifying carriers.).

sharing agreement."³⁷⁸ Having adopted an approach based on negotiations between parties, we do not need to reach conclusions on many of the specific issues raised in the NPRM regarding specific terms, contents, and timing of notice pursuant to section 259(c).

147. A number of commenters go further and essentially suggest that the Commission is not authorized to adopt rules to implement section 259(c).³⁷⁹ These parties point to specific language in subsections (a) and (b) that directs the Commission to issue regulations, and note the absence of such language in subsection (c). We are not persuaded that the absence of a specific directive in subsection (c) prohibits the Commission from issuing interpretive regulations.

148. Our decision not to adopt detailed interpretive regulations notwithstanding, we believe that guidance is appropriate and adopt the tentative conclusion offered in our NPRM that providing incumbent LECs should give notice to qualifying carriers of changes in the providing incumbent LECs' network that might affect qualifying carriers' ability to fully benefit from section 259 agreements. Without adequate notice of changes to an incumbent LEC's network that affect a qualifying carrier's ability to utilize the shared public switched network infrastructure, technology, information, and telecommunications facilities and functions, a qualifying carrier may be unable to maintain a high level of interoperability between its network and that of the providing incumbent LEC. At a minimum, we believe that it would be unreasonable to expect qualifying carriers to be able to react immediately to network changes that the providing incumbent LEC may have spent months or more planning and implementing. Consistent with our conclusion that the terms of information disclosure should be the product of negotiation between the parties, we conclude that there is no need to adopt any additional mechanisms specific to this section, at this time. Again, we reaffirm that parties may avail themselves of guidance from the Commission, pursuant to our declaratory ruling and complaint processes, if disputes arise.

149. We are not persuaded by commenters that suggest section 259(c) does not place any additional obligations on providing incumbent LECs. GTE argues that providing incumbent LECs need not furnish any additional notice beyond that already required under section 251(c)(5) because all of the information obtained in section 259 is encompassed in section 251(c)(5). NCTA urges the Commission to restrict the information that can be disclosed under section 259(c) so that it does exceed the public notice provided under section 251(c)(5).³⁸⁰ We agree, however, with RTC that Congress included section 259(c) to address the unique situation of carriers working in cooperative relationships. We believe that in certain circumstances parties may agree that section 251(c)(5) or other network disclosure provisions will provide sufficient

³⁷⁸ Southwestern Bell Comments at 14.

³⁷⁹ GTE Comments at 21. See also NYNEX Reply Comments at 11; Southwestern Bell Comments at 14; USTA Comments at 25.

³⁸⁰ NCTA Comments at 8 (expressing concern that competitive LECs will not have sufficient information about planned deployments to compete with qualifying carriers).

information disclosure, yet it is not clear that parties will always reach such an agreement. With regard to NCTA's concerns about anticompetitive behavior between neighboring LECs, we reaffirm our conclusions as described in Section III. B. 1., *supra*, that the continued applicability of the antitrust laws and the Commission's authority under Title II are more than sufficient to address section 259 arrangements which are found to violate the public interest.³⁸¹

150. We believe that section 259(c) requires information disclosure only by providing incumbent LECs that have entered into section 259 agreements. We note that no parties indicated that qualifying carriers should be subject to the information disclosure requirements of section 259(c). While qualifying carriers must respond to changes in the providing incumbent LEC's network, the record contains no evidence that a qualifying carrier would make unilateral changes in its network that would affect the providing incumbent LEC's network. In addition, we raised the issue of whether the phrase "infrastructure sharing agreements," as used in section 259(c), would apply to all Section 259 agreements or only in those involving "infrastructure." RTC and MCI, the only parties to comment on this issue, agreed that the phrase "infrastructure sharing agreement" is a generic term that covers all sharing under section 259.³⁸² We note that no other party indicated any contradictory interpretation. Accordingly, we conclude that the obligations to "provide timely information" in section 259(c) apply to providing incumbent LECs in all section 259 agreements.

151. We further conclude that section 259(c) contemplates information disclosure only to those qualifying carriers that have entered into section 259 agreements. We are not persuaded that section 259(c) requires public notice that could be used as a resource for potential qualifying carriers or that the obligations of section 259(c) should be placed on incumbent LECs that have not entered into sharing agreements.³⁸³ We note that the plain language of section 259(c) requires disclosure by a providing incumbent LEC that "*has entered into an infrastructure sharing agreement . . . to each party to such an agreement*" and we concur with USTA that section 259 disclosure requirements are only for the benefit of the parties to the agreement. Nothing in the statute indicates to us that public notice is required. Further, as several parties have noted, section 251(c)(5) places network disclosure obligations on all incumbent LECs and is available to the public, including potential qualifying carriers. Our Computer II rules³⁸⁴ and Part 68 rules³⁸⁵

³⁸¹ See, e.g., 47 U.S.C. § 211.

³⁸² RTC comments at 16; MCI Comments at 13.

³⁸³ MCI Comments at 12; RTC Comments at 16.

³⁸⁴ See 47 C.F.R. § 64.702, as interpreted in the *Second Computer Inquiry* ("all carrier rule"). See also *Amendment of Section 64.702 of the Commission's Rules and Regulations*, Memorandum Opinion and Order on Reconsideration, 84 FCC 2d 50, 82-83 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom. Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983) (*Second Computer Inquiry*).